

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT G. POSENJAK,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

NO. CV-05-117-FVS

ORDER DISMISSING PETITION WITH
PREJUDICE

BEFORE THE COURT is Petitioner's Response (Ct. Rec. 8) to the Order to Show Cause filed June 16, 2005 (Ct. Rec. 7). The court directed Mr. Posenjak to show cause why his petition should not be dismissed on the basis that Mr. Posenjack is no longer "in custody" as required by 28 U.S.C. §§ 2241(c)(3) and 2254(a). *See Maleng v. Cook*, 490 U.S. 488, 490-91 (1989); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

Petitioner states on April 3, 2003, the Douglas County Superior Court issued a suspended one year jail sentence against Mr. Posenjak for the gross misdemeanor of possessing an Elk without State licences and tags. Petitioner indicates the Washington State Court of Appeals, Division III, denied his appeal and then denied his motion for reconsideration on May 17, 2005.

1 Mr. Posenjak argues his suspended sentence began to run only
2 after the Court of Appeals issued its decision on May 17, 2005, and
3 that he will remain "in custody" until May 17, 2006. His reliance on
4 *King v. King*, 468 P.2d 464 (Wash. App. 1980), a case involving divorce
5 proceedings, is not relevant to Petitioner's criminal misdemeanor
6 conviction.

7 The applicable portion of Washington State's Suspended Sentence
8 Act, provides in pertinent part:

9 In the case of a person granted a suspended sentence under
10 the provisions of RCW 9.92.060, the court shall establish a
11 definite termination date for the suspended sentence. The
12 court shall set a date **no later than the time the original**
13 **sentence would have elapsed** and may provide for an earlier
14 termination of the suspended sentence. Prior to the entry of
15 an order formally terminating a suspended sentence the court
16 may modify the terms and conditions of the suspension or
17 extend the period of the suspended sentence.

18 RCW 9.92.064 (emphasis added). Here, Mr. Posenjak was sentenced on
19 April 3, 2003, to one year in jail, suspended. That time period has
20 elapsed. Accordingly, Petitioner's assertion of continued custody
21 lacks merit.

22 Although granted the opportunity to do so, Mr. Posenjak did not
23 come forward with facts demonstrating he is presently on parole,
24 probation or supervised release, or that he is subject to revocation
25 and re-incarceration under the 2003 conviction. See *Jones v.*
26 *Cunningham*, 371 U.S. 236, 242 (1963). Accordingly, because Petitioner
27 is not "in custody," **IT IS ORDERED** the petition is **DISMISSED with**
28 **prejudice** for lack of jurisdiction.

29 **IT IS SO ORDERED.** The District Court Executive is directed to
30 enter this Order, enter judgment, forward a copy to Petitioner at his

1 last known address, and close the file.

2 **DATED** this 21st day of July 2005.

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4 s/ Fred Van Sickle
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6 FRED VAN SICKLE
7 CHIEF UNITED STATES DISTRICT JUDGE
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